Supreme Court, U.S.
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No. 98-942

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can flout the Due Process Clause of the Fourteenth Amendment in order to deny federal habeas corpus relief to an incontestably innocent prisoner by claiming that an appellate decision constitutes "new law," when in fact the state did not and could not prove a key element of the offense charged?

2. Whether federal habeas relief should be extended to protect federal constitutional rights when a state refuses to retroactively apply a case which based its decision on the already existing clear language of the statute?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were as follows:

Appellants: Gregory White, *Warden of the State Correctional Institution at Pittsburgh*

The Attorney General of the Commonwealth of Pennsylvania

Appellee: William Fiore

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CITATIONS TO OPINIONS

The July 21, 1998 Judgment and Opinion of the United States Court of Appeals for the Third Circuit, which appears in the Appendix to the December 9, 1998 Petition for Writ of Certiorari, is reported at 149 F.3d 221 (1998) (No. 97-3288) (Pet. App. B[1] and Pet. App. A, respectively). No other federal court orders related to the petition for writ of habeas corpus are reported. The petition for rehearing of the July 21, 1998 decision was denied on September 23, 1998 (Pet. App. C). The July 21, 1998 Judgment and Opinion reversed the April 24, 1997 Memorandum Order, which adopted the February 27, 1997 Magistrate Judge's Report and Recommendation of the United States Court of Appeals for the Western District of Pennsylvania (No. 96-1231). The District Court's Order and the Magistrate Judge's Report also appear in the Appendix to the Petition for Writ of Certiorari (Pet. App. D and Pet. App. E, respectively).

Petitioner's April 10, 1987 Judgment of Sentence in the Court of Common Pleas, Criminal Division, Allegheny County, Pennsylvania is recorded at No. CC 8508740. It is unreported. The Superior Court of Pennsylvania's May 12, 1989 Memorandum Opinion affirming his judgment of sentence is unreported (No. 485 Pittsburgh

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[1] "Pet. App." denotes Appendices A-F, which were reproduced and attached to the Petition for Writ of Certiorari. Pursuant to Supreme Court Rule 26, these Appendices were not again reproduced in the Joint Appendix. As required, Appendices A-F are identified in the Joint Appendix's Table of Contents.

1988) (J.A. 98).[2] The *per curiam* affirmance is reported at 563 A.2d 189 (Pa. Super. 1989). Petitioner Fiore's petition to the Pennsylvania Supreme Court for allowance of appeal was denied in an unpublished order on March 13, 1990 at 575 A.2d 102 (Pa. 1990) (No. 310 W.D. Alloc. Dkt. 1989).

David Scarpone, co-defendant of Petitioner Fiore, was tried before the same court and the same jury as Petitioner Fiore (J.A. 6). Scarpone's convictions also are recorded at No. CC8508740. The August 5, 1991 reversal of Scarpone's conviction is published at *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991) (J.A. 104). On March 25, 1992, the Pennsylvania Supreme Court, in an unpublished order (without an opinion), denied Petitioner Fiore's application for extraordinary relief (No. 9 W.D. Misc. Dkt. 1992) to take jurisdiction over his case and consolidate it with the appeal of *Commonwealth v. Scarpone* to the Pennsylvania Supreme Court. The December 15, 1993 Pennsylvania Supreme Court Opinion affirming the Commonwealth Court's decision is reported at *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993) (J.A. 115). The March 22, 1994 Order of the Pennsylvania Supreme Court (No. 7 W.D. Misc. Dkt. 1994) denying Petitioner Fiore's second emergency application is also unreported.

The August 18, 1994 Findings of Fact and Conclusions of Law and Order of Court from the Allegheny

[2] "J.A." denotes the Joint Appendix, which was filed today along with Petitioner's Brief on the Merits.

County Court of Common Pleas (No. CC8508740) denying Petitioner Fiore's petition for post-conviction relief are unpublished. The Pennsylvania Superior Court's September 20, 1995 opinion affirming the trial court's August 18, 1994 Order is reported at 665 A.2d 1185 (Pa. Super. 1995) (J.A. 141). The Pennsylvania Supreme Court's April 19, 1996 denial of Petitioner Fiore's petition for allowance of appeal is reported at 675 A.2d 1243 (Pa. 1996).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On July 21, 1998 the Court of Appeals reversed a District Court order granting a petition for writ of habeas corpus (Pet. App. A to Pet. App. B and Pet. App. D to Pet. App. E). Petitioner timely filed a petition for rehearing requesting rehearing and/or rehearing *en banc*. The petition was denied by the Court of Appeals on September 23, 1998 (Pet. App. C).

On December 9, 1998, Petitioner timely filed a Petition for Writ of Certiorari. On March 29, 1999 this Court granted the Petition to review the first and third questions.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

From the time of his conviction, Petitioner Fiore has been denied due process of law as guaranteed by the

Fourteenth Amendment to the United States Constitution in that he is incarcerated for a crime based on evidence which indisputably does not support each essential element of the offense charged.

1. ***United States Constitution, Amendment XIV, § 1***:

   "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. ***Habeas Corpus,***
   28 U.S.C. § 2243:

   "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

   The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

   The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

   When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

   Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

   The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

   The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

   The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

3. ***Habeas Corpus,***
   28 U.S.C. § 2254(a):

   "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

4. ***Rules of Strict and Liberal***
   Construction, 1 Pa. C.S.A. § 1928(b)(1):

   "(b) All provisions of a statute of the classes hereafter enumerated shall be strictly construed:

   (1) Penal provisions."

5. ***Crimes Code,***
   18 Pa. C.S.A. § 107(b):

   "(b) Common law crimes abolished – No conduct constitutes a crime unless it is a crime under this title or another statute of this Commonwealth."

6. ***Solid Waste Management Act, ("SWMA"), 35 P.S. § 6018.401(a)***:

> "(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department."

7. ***Solid Waste Management Act, ("SWMA"), 35 P.S. § 6018.606(f)***:

> "(f) Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both." [footnote omitted]

CONCISE STATEMENT OF THE CASE

The relevant facts presented are not in dispute. William Fiore owned and operated a hazardous waste facility in western Pennsylvania under permit from the state's

Department of Environmental Resources ("DER")[3] (Pet. App. A-3). The DER did not dispute that Petitioner had obtained a permit for this facility. Fiore and the facility's general manager, David Scarpone, were charged with various criminal counts, including the operation of a hazardous waste disposal facility without a permit in violation of Pennsylvania's Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony (Pet. App. A-3 and Pet. App. E-2 to E-4).

The essence of the felony charge against Petitioner and Mr. Scarpone was that they criminally operated a hazardous waste facility without obtaining a permit (Pet. App. E-3 to E-4).[4]

It is undisputed that Petitioner Fiore and his employee Scarpone *had* a DER permit to operate the facility (J.A. 180). At trial the Commonwealth argued that because they operated the facility contrary to the parameters of the DER permit, the permit became "null" and, effectively, nonexistent (Pet. App. A-3).

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revocate or suspend that permit, or must it be worded so in the permit?" (J.A. 128).

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Petitioner's counsel suggested that the proper answer to both parts of the jury's

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[3] Subsequently, the agency's name was changed to the Pennsylvania Department of Environmental Protection.

[4] *See also, Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (J.A. 121).

question was "no," because under the SWMA regulations no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal such revocations, suspension or modification to Pennsylvania's Environmental Hearing Board. The Court incorrectly instructed the jury that if Petitioner's conduct was sufficiently egregious and outside the parameters of the permit, the permit was effectively revoked (J.A. 178-180).

Thereafter, the jury returned guilty verdicts as to Petitioner and Scarpone. Both appealed their respective judgments of sentence imposed by the Court of Common Pleas. Fiore appealed to the Superior Court of Pennsylvania; Scarpone to the Commonwealth Court of Pennsylvania.[5] The Superior Court *sua sponte* transferred Fiore's appeal to the Commonwealth Court. Upon Fiore's motion, his appeal was subsequently transferred back to the Superior Court (J.A. 128, J.A. 181).

The Superior Court affirmed his conviction. The Pennsylvania Supreme Court then denied Fiore's petition for allowance of appeal. *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989) (table), *alloc. denied*, 575 A.2d 1185 (Pa. 1990); (*see also* Pet. App. E-5 to E-6 and J.A. 98).

Scarpone's appeal was decided by the Pennsylvania Commonwealth Court. In *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd*, *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993) (J.A. 104 and J.A. 115), the court held that since Petitioner had a permit to operate

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[5] The Commonwealth Court and the Superior Court are intermediate appellate courts in Pennsylvania (*see* Pet. App. E-5 n.2 and E-11).

the facility, his employee, Scarpone, could not be convicted of operating *without a permit*. Scarpone's conviction was reversed. *Id.*; (Pet. App. E-7 and J.A. 114).

The Pennsylvania Supreme Court granted the Respondent's petition to review the Commonwealth Court's decision in *Scarpone* (Pet. App. E-7 and J.A. 115). Meanwhile, Fiore petitioned the Pennsylvania Supreme Court by emergency application (No. 9 W.D. Misc. Dkt. 1992) to reconsider his conviction in conjunction with its review of *Scarpone*. The Pennsylvania Supreme Court denied the emergency application (Pet. App. E-7).

The Pennsylvania Supreme Court recognized the identity of the situations in *Scarpone* and *Fiore*. Its opinion affirmed the Commonwealth Court's reversal of Scarpone's conviction:

> We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Commonwealth v. Scarpone, 634 A.2d at 1112 (J.A. 121). The state's highest court concluded:

> The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility **without a permit** is a bald fiction we cannot endorse.

Scarpone, 634 A.2d at 1112 (emphasis in original) (J.A. 122).

Thereafter Petitioner Fiore filed another emergency application with the Pennsylvania Supreme Court (No. 7

W.D. Misc. Dkt. 1994) requesting it to reverse the stark inequity of his conviction. The application was denied (Pet. App. E-8).

Petitioner then filed a motion for post-conviction collateral relief (Pet. App. E-8 and J.A. 124). The trial court denied the motion (J.A. 141). Its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995), *alloc. denied*, 675 A.2d 1243 (Pa. 1996) (J.A. 141).

On July 3, 1996, Petitioner Fiore filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania (No. 96-1231). The petition raised two essential issues:

1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.
2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal protection rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

(J.A. 166-167 and Pet. App. E-9 to E-10). In a report issued on February 27, 1997, United States Magistrate Judge Francis X. Caiazza recommended that the writ be granted (Pet. App. E-1). On April 21, 1997 United States District Court Judge Gary L. Lancaster adopted the Magistrate's Report and Recommendation (Pet. App. D-1 to D-2). The District Court further ordered that Fiore be released from the part of his incarceration that stemmed from his convictions under 35 P.S. § 6018.401(a) and § 6108.606(f) (Pet. App. D-2). The District Court's decision was based, in part, on the fact that Fiore's conviction was affirmed

while his co-defendant's was reversed on the same factual issue – whether a permit existed (Pet. App. E-12, E-17 to E-18).

On July 21, 1998 the United States Court of Appeals for the Third Circuit reversed the District Court (Pet. App. A. and Pet. App. B). A petition for rehearing was denied (Pet. App. C). Petitioner Fiore remains incarcerated in the State Correctional Institute at Pittsburgh, Pennsylvania for committing acts which never were criminal under the penal provisions charged.

On December 9, 1998, Fiore filed a Petition for Writ of Certiorari, which presented three questions for review. On March 29, 1999, this Court granted Certiorari to review Questions 1 and 3.

SUMMARY OF THE ARGUMENT

Petitioner William Fiore owned and operated a hazardous waste facility under permit from the State's Department of Environmental Resources. He and his general manager/co-defendant David Scarpone were charged and convicted for operating a hazardous waste facility without a permit.

On appeal, the Pennsylvania Superior Court upheld Petitioner Fiore's conviction, and the Pennsylvania Supreme Court refused to review it. However the Pennsylvania Commonwealth Court, on the same facts, reversed co-defendant Scarpone's conviction, and its reversal was affirmed by the Pennsylvania Supreme Court. In *Scarpone*, the courts held that the government

could not prove every element of the crime because a permit existed. The two conflicting decisions on the same facts are impossible to reconcile.

The Due Process Clause of the federal Constitution requires the government to prove each element of the crime beyond a reasonable doubt. In *Fiore* an individual was convicted when the government could not prove the elements of the offense charged. Petitioner is not relying upon retroactive application of the *Scarpone* decision. Rather, he cites the *Scarpone* decision to support his claim of innocence and that he is incarcerated in violation of his due process rights. This Court should reverse the Court of Appeals and grant Petitioner Fiore habeas relief. Such relief is proper because an innocent man remains incarcerated in defiance of due process.

The Court of Appeals for the Third Circuit erred in failing to apply the Pennsylvania Supreme Court's ruling in *Scarpone* to the facts and circumstances of Petitioner's case. It likewise erred in determining that the retroactive application of *Scarpone* was disallowed by decisions of this Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not state a "new rule of law" and therefore its retroactive application is not forbidden by *Teague v. Lane* or any other decision of this Court. Rather, *Scarpone* was based on well-established, preexisting rules of constitutional and statutory law.

The petition for writ of habeas corpus is based on constitutional principles which unquestionably were in effect at the time of Petitioner's trial, and before his conviction became final. His conviction breached due

process in that the Commonwealth failed to prove an essential element of the crime charged.

Assuming arguendo that the proscriptions in *Teague v. Lane* apply, the facts of this case fall within a well established exception against retroactive application of new rules of law. When a new rule of law places certain kinds of primary conduct beyond the power of criminal lawmaking authority to prohibit, the new rule may be applied retroactively. It is undisputed that Petitioner Fiore's conduct is not proscribed by the Pennsylvania statute upon which his anomalous conviction stands.

The facts herein present a quintessential case of the incarceration of an innocent man. This Court consistently has determined that the equitable purpose of the writ will be applied, despite procedural errors or other factors which weigh in favor of the state's interest in finality, if the Petitioner makes a "colorable" showing of innocence. Petitioner Fiore unquestionably is innocent of the crime charged. The failure of this Court to use its equitable authority to give him the benefit of the law and facts would constitute a continuation of this unusual miscarriage of justice.

ARGUMENT

An Indisputably Innocent Man Remains Incarcerated For A Crime The Commonwealth Concedes That It Could Not Prove. This Court Should Correct The Continuing Miscarriage Of Justice That Occurred When The Court Of Appeals Reversed The District Court's Grant Of Federal Habeas Relief.

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a). This Court must "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

As early as 1970, Justice Brennan writing for the majority recognized that:

> [a] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

In Re Winship, 397 U.S. 358, 363-364 (1970).

Petitioner Fiore is actually innocent of the crime which is the basis of his incarceration. His incarceration runs afoul of the federal Constitution and this Court's clearly established precedent in that the Fourteenth Amendment of the United States Constitution prohibits incarcerating a person when the Respondent Commonwealth could not and cannot prove each element of the crime charged.

A. IN VIOLATION OF THE DUE PROCESS CLAUSE, PETITIONER FIORE WAS CONVICTED, SENTENCED AND INCARCERATED ON THE BASIS OF FACTS WHICH DID NOT ESTABLISH EACH ELEMENT OF THE CRIME CHARGED.

The cornerstone of the American criminal justice system is that defendants are "presumed innocent" and can be convicted only if the government proves each element of the crime **charged** "beyond a reasonable doubt." This presumption has been referred to as the "golden thread" that runs throughout our criminal justice system.[6] The conviction, sentencing and continued incarceration of Petitioner Fiore defies this fundamental principle of law and threatens to snarl this golden thread.

The question before this Court is whether or not the Due Process Clause is violated when an individual is convicted, sentenced and incarcerated for a crime the government could not prove.

Petitioner Fiore was imprisoned on the basis of facts that never constituted a crime under the section of the penal code charged. After years of result-oriented decisions on the part of the Pennsylvania court system, the United States District Court for the Western District of Pennsylvania finally recognized this constitutional deprivation and properly granted the writ of habeas corpus (Pet. App. D-1 to D-2, E-1, E-17 to E-18). In reversing this decision, the United States Court of Appeals for the Third

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[6] S. Sundby, *"The Reasonable Doubt Rule and the Meaning of Innocence,"* 40 Hasting L.J. 457 (1989), quoting A. Cross, *The Golden Thread of the Criminal Law* 2 (1976).

Circuit regrettably stripped Petitioner Fiore of his elemental rights and rejected his constitutional claims (Pet. App. A – Pet. App. B and Pet. App. C).

Petitioner Fiore is incarcerated for a crime he is factually and legally innocent of committing. Therefore, the Due Process Clause is violated. Petitioner Fiore submits his case to this Court of last resort so that a fundamental protection of the federal Constitution and our criminal justice system can be given meaning again.

1. Petitioner Fiore Is Innocent.

The statutory section under which Petitioner Fiore was convicted, sentenced and incarcerated reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . **unless such person . . . has first obtained a permit for the storage,** treatment and disposal of hazardous waste from the department [of environmental resources].

35 P.S. § 6018.401(a) (emphasis added). The pivotal element of this offense is the requirement that a person obtain a permit. The Respondent Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times (Pet. App. A-3 and Pet. App. E-2 to E-4).

Petitioner argued during his criminal trial and on direct appeal that his possession of a permit constituted an absolute defense to this crime (Pet. App. E-4 to E-9). In fact, that is precisely what the Pennsylvania Supreme

Court ruled in *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (J.A. 121). Petitioner is not insisting that *Scarpone* be applied to his case. To the contrary, Fiore is requesting that he be given the same due process protections that have been afforded to criminal defendants since *Winship*.

2. The Guarantees Of The Due Process Clause Require Proof Beyond A Reasonable Doubt Of Every Element Of The Offense.

The Due Process Clause of the federal Constitution requires the Commonwealth of Pennsylvania to prove each element of the offense charged, including the failure to obtain a DER permit, beyond a reasonable doubt. *E.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Patterson v. New York*, 432 U.S. 197 (1977); *Leland v. Oregon*, 343 U.S. 790 (1952). In order to convict a defendant, the Due Process Clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of **every** fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364 (emphasis added); *Scarpone*, 634 A.2d at 1112 (J.A. 121). As this Court reasoned as early as 1960:

> Just as "conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt.

Thompson v. Louisville, 362 U.S. 199, 206 (1960) (internal footnotes omitted).

As Justice Kennedy recently reaffirmed in a dissenting opinion:

> Criminal laws proscribe certain conduct and specify punishment for transgressions. A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements. As a general rule, each element of a charged crime must be set forth in an indictment, *Hamling v. United States*, 418 U.S. 87, 117 [ ] (1974), and established by the government by proof beyond a reasonable doubt, *In re Winship*, 397 U.S. [at] 364. . . .

Jones v. United States, ___ U.S. ___, 119 S.Ct. 1215, 1230 (1999) (dissent based upon other grounds).

The conviction violates the constitutional guarantees set forth in *Winship, supra,* and its progeny because the government did not meet its burden of proof as to the pivotal element of the offense – the failure to obtain a DER permit. Petitioner has stated a cognizable federal constitutional claim, because the evidence in support of his state conviction cannot be fairly characterized as sufficient to lead a rational trier of fact to find him guilty beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 321 (1979).[7] These constitutional requirements underscored the Pennsylvania Supreme Court's decision in *Scarpone*. *Thompson* predates Petitioner's conviction by over 25 years; *Winship* predates Petitioner's conviction by over 15 years. Since his trial Petitioner Fiore has simply been seeking that these well established due process

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[7] *Jackson* lowered the *Thompson, supra,* standard that the conviction must be "totally devoid of evidentiary support." *Thompson,* 362 U.S. at 199. Petitioner submits that even under the more stringent *Thompson* standard, his incarceration is unconstitutional based upon the facts in evidence.

guarantees be applied to his case. Therefore, Fiore is not relying upon retroactive application of the law to his case. To label his federal habeas petition otherwise undermines the guarantees of the Fourteenth Amendment.

As this Court reasoned in *United States v. Johnson*, 457 U.S. 537 (1982), "application of clear pre-existing" constitutional rules, such as Fourth Amendment guidelines, "raise no real questions of retroactivity at all." *Id.* at 560. Therefore, contrary to the Court of Appeals' decision, Petitioner Fiore is not simply seeking retroactive application of the law. Rather, his habeas petition relies upon the argument that baseline federal constitutional protections that were obtained before, during, and after his case should apply to his incarceration. He implores this Court not to deviate from its well established due process requirements for convicting and incarcerating an individual.

This Court's precedent holds that Petitioner Fiore cannot be detained, if the trial court lacked authority to punish him in the first place. This cornerstone of the American criminal justice system remains firmly planted despite technical procedural matters such as putative nonretroactivity. *See Johnson*, 457 U.S. at 550, *citing United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) and *Robinson v. Neil*, 409 U.S. 505, 509 (1975). *See also, infra,* Section B. The trial court had no authority to incarcerate Petitioner because Respondent could not prove each element of the offense charged.

The litmus test of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 559 (1974), *citing Dent v.*

West Virginia, 129 U.S. 114, 123 (1889). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The law "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976). Contrary to Respondent's assertions, the Petitioner had *no* notice that he could have been violating the statute in question because he possessed a permit. *Accord*, *Scarpone*, 634 A.2d at 1112 (J.A. 121). To charge otherwise is a clear due process violation because Petitioner had no notice that having a permit still could expose him to liability.

Case law supports Petitioner's contention that he has been denied due process by the Pennsylvania court system and the Court of Appeals. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), that Court faced a factual situation similar to the one at bar. On a writ of *coram nobis*, it was asked to apply retroactively a United States Supreme Court decision to a prior conviction. In deciding to grant the writ, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971) and determined that its decision was based on "the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law." *Travers*, 514 F.2d at 1175, *quoting*

Liguori, 438 F.2d at 669. This is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Id.*

In *Davis v. United States*, 417 U.S. 333 (1974), the Court stated that if the habeas petitioner's contentions were true that his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346. Collateral relief is necessary to correct a "fundamental" defect in the sentencing and incarceration of an innocent person. *Id.*

The *Davis* Court concluded:

> In this case, the petitioner's contention is that [an earlier decision] establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

417 U.S. at 346-47 (internal citations omitted).

As in *Davis*, Petitioner Fiore is incarcerated for actions that are not criminal, as determined by the explicit language of the statute and as recognized by the highest court of Pennsylvania. The Pennsylvania courts

failed to apply the basic due process principles discussed above. This Court now has the opportunity to cure this fundamental defect. Moreover, in the past this Court has demonstrated that it is important to use the writ of habeas corpus to ensure that innocent people are not incarcerated. *See, e.g., O'Neal v. McAninch*, 513 U.S. 432, 441 (1995) (" . . . the basic purposes underlying the writ of habeas corpus [is to address] . . . error of constitutional dimension – the sort that risks an unreliable trial outcome and the consequent conviction of an innocent man.")

Petitioner Fiore has a liberty interest in his freedom. This Court has reasoned in the past that the government is required to prove each element of the crime charged beyond a reasonable doubt to protect this interest. This is a classic situation in which habeas relief must be invoked to prohibit the incarceration of an innocent man. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's right to due process of the law.

3. Federal Habeas Relief Should Be Granted For Due Process Violations.

Following *Winship's* logic, this Court has taught that claims of insufficiency of the evidence upon which to base a conviction are cognizable as due process violations reviewable by writ of habeas corpus. *Jackson*, 443 U.S. at 319.

In assessing challenges to the sufficiency of the evidence, the question for habeas courts is not whether there was any evidence to support a conviction, but " 'whether, after reviewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.' " *Wright v. West*, 505 U.S. 277, 284 (1992), *quoting Jackson*, 443 U.S. at 319. Petitioner was convicted on the basis of not having a DER permit. He clearly had a permit at all relevant times. No rational trier of fact could conclude otherwise. In *Scarpone*, the Pennsylvania appellate courts effectively recognized this constitutional deprivation when they held that Scarpone was an innocent man due to the existence of a DER permit. *Id.* at 1112 (J.A. 121).

4. The District Court Properly Determined That Petitioner Fiore's Constitutional Rights Are Being Violated By His Incarceration For A Crime He Could Not Have Committed.

The District Court properly gave weight to the *Scarpone* courts' recognition that Petitioner and Scarpone were innocent and that Petitioner's incarceration is an "egregious injustice because it represents a deprivation of Fiore's liberty interests" (Pet. App. E-16). The Pennsylvania Supreme Court noted the identities of the situations in *Scarpone* and *Fiore* when it held:

> We find that the Commonwealth did not make out the crime of operating a waste disposal facility **without a permit** against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Scarpone, 634 A.2d at 1112 (emphasis added) (J.A. 121).

The Court of Appeals rationalized its reversal of the grant of habeas by ignoring the due process issue. It erred in framing its analysis of Petitioner's due process claim as simply a request that Petitioner be afforded retroactive application of the Pennsylvania Supreme Court's decision in *Scarpone*. Rather, Petitioner's due process claim is a straightforward contention that the trial court had no authority to punish him because the uncontradicted evidence of record does not establish each essential element of the crime beyond a reasonable doubt. Fiore is legally innocent of violating the crime he was convicted of committing. Therefore, it is illegal to keep him incarcerated.

As is discussed below in Section B, the Court of Appeals focused exclusively on the retroactivity issue. The appellate decision ignored a fundamental principle of constitutional law. A state court conviction violates the Due Process Clause when the government can not prove each element of the offense "beyond a reasonable doubt." *Winship*, 397 U.S. at 364. Even when the evidence is viewed in the light most favorable to the Respondent, the continued incarceration of Petitioner Fiore is unconstitutional. *Jackson*, 443 U.S. at 319. Petitioner Fiore is not relying upon the benefit of a new law. He is seeking the vindication of a clearly established constitutional doctrine.

5. The Deprivation Of Petitioner Fiore's Due Process Rights Warrants Reversal By This Court.

Every day that Petitioner Fiore remains imprisoned, a fundamental breach of due process occurs. An innocent

man who was not, could not and cannot be proven guilty of every element of the crime has been convicted.

Respondent effectively concedes that it has no legitimate response to Petitioner Fiore's due process allegations. Like the Court of Appeals, Respondent focused on the retroactivity argument and ignored Petitioner's constitutional claims. It failed to address this argument. In its Brief in Opposition to the Petition for Writ of Certiorari at pages 4-6, Respondent argues in slightly more than two pages that Petitioner's due process claim is barred because it is a request for retroactive application of the law. This is the case because the Respondent inherently recognizes that there is no legitimate argument to support the continued incarceration of an innocent man.

Petitioner Fiore's petition for writ of habeas corpus simply requested that the longstanding constitutional principle that the Due Process Clause requires proof of every element of the crime be applied to his case. The District Court correctly granted the writ to correct this grave injustice. The Court of Appeals erroneously ignored this issue and perpetuated the miscarriage of justice.

B. THE COURT OF APPEALS MISPERCEIVED RETROACTIVITY.

The second question presented relates to the grounds upon which the Court of Appeals rationalized the reversal of the grant of habeas relief and involves the applicability of the principle of nonretroactivity. That principle prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced

after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), *citing Stringer v. Black*, 503 U.S. 222 (1992).

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court clarified how the question of retroactivity should be resolved for cases on collateral review, holding that *new* rules of law should not be applied retroactively on collateral review. *Id.* at 310.

Here the Court of Appeals reversed the District Court's grant of habeas relief by straining to characterize the relief sought as a violation of the prohibition against retroactively applying a new rule of law (Pet. App. A-2).

1. The *Scarpone* Decision Did Not State A "New Rule Of Law," And Therefore The *Teague* Restrictions Do Not Apply.

The Court of Appeals' error lies in its characterization of the Pennsylvania Supreme Court's *Scarpone, supra*, decision as a "new rule of law."

In *Commonwealth v. Blystone*, 725 A.2d 1197 (Pa. 1999), the Pennsylvania Supreme Court indicated its adoption of *Teague's* guidance on the retroactive application of new rules of law.

> In *Teague v. Lane*, [ ] the United States Supreme Court barred the retroactive application upon collateral review of a new constitutional rule of criminal procedure that is announced after a defendant's conviction is final, because all avenues of direct appeal have been exhausted. The Teague Court held that a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government, or if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id. at 1202-1203 (footnote and citation omitted).

Scarpone did not create a new rule of law. The state appellate courts simply held that the evidence did not support a conviction because the uncontroverted facts established that then-defendant Scarpone **had** a DER permit. Thus, the Commonwealth had failed to establish one essential element of the offense. The Court did not accord the Commonwealth's contorted argument to the contrary with a substantive discussion. Rather, the Court simply stated that the Commonwealth's position, adopted by the Superior Court of Pennsylvania, was a "bald fiction we cannot endorse." *Id.* at 1112 (J.A. 122). A DER permit existed. Petitioner and his co-defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. Petitioner Fiore is simply seeking consistency on the basis of the same facts.

The succinct *Scarpone* opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, its decision is based on the simple principle that penal statutes must be strictly construed so as to provide clear notice of what conduct is illegal, 1 Pa. C.S.A. § 1928(b)(1),[7] and on the corresponding Constitutional

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[7] The strict construction requirement of penal statutes is based on constitutional due process protections. "The rationale behind strict construction of a penal statute is the injustice of convicting a person without clear notice to him that his contemplated conduct is unlawful[.]" *Commonwealth v.*

mandate that due process requires the government to prove each element of the offense charged beyond a reasonable doubt. *Winship*, 397 U.S. at 364. The *Scarpone* decision does not revise or reverse previous case law, nor has the Commonwealth raised such an argument. The statute in question was clear on its face. One of the elements was the failure to obtain a permit. *See* 35 P.S. § 6018.401(a).

A review of Pennsylvania case law reveals no decisions upon which the Commonwealth reasonably could have relied in prosecuting Petitioner under its interpretation of the law. On the contrary, all extant precedent militated in favor of not indicting much less convicting in the absence of a full complement of the statutory elements of the offense.

Judicial construction of a statute is an "authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (footnote omitted). *Scarpone, supra,* simply stated the parameters of the penal statute; it did not change or alter those parameters; it did not clarify an ambiguity; it did not create a "new rule" of either procedural or substantive law.

Broughton, 390 A.2d 1282, 1286 (Pa. 1978). *See also, Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976). *Accord, In re Suspension of DeMarco*, 414 A.2d 1339 (N.J. 1980) (at the heart of the rule requiring strict construction is the principle of due process). Moreover, strict construction of penal statutes has been required in Pennsylvania long before the enactment of that statutory requirement. *Accord, In re Laub*, 21 A.2d 575, 581 (Pa. 1941).

2. Petitioner Fiore Raised A Constitutional Due Process Challenge To The Pennsylvania Courts' Failure To Require The Commonwealth To Prove Each Element Of The Crime Charged.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather interpreted an unambiguous statute and applied established constitutional principles.

In *Scarpone*, the Court was not required to interpret an ambiguous term or phrase or to apply a legislative intent analysis. Rather, it concluded that due process had been violated because the Commonwealth had not proven each essential element of the offense charged. *Id.* at 1112 (J.A. 121). This construction is supported by prior decisions of this Court.

In *Bailey v. United States*, 516 U.S. 137 (1995), in a direct appeal, this Court interpreted the term "use" in a penal statute. The Court rejected the lower court's adoption of a "proximity and accessibility" test to determine if a defendant had "use" of a gun, and applied a plainer meaning to the term in determining that "use" denotes "active employment."

Subsequently, in *Bousley v. United States*, 523 U.S. 614, ___, 118 S.Ct. 1604, 1610 (1998), this Court held that the *Teague* rules on retroactivity did *not* apply to retroactive application of *Bailey* because the constitutional claim challenged Bousley's guilty plea as not "knowing and intelligent." The issue raised was whether a guilty plea could survive when both the prosecuting and defending attorneys, as well as the defendant, misunderstood the statutory meaning of the term "use" while entering into

the plea. *Id.* at 1608-1609. The court supported its determination that *Bailey* should be applied retroactively with the conclusion that there is "nothing new" about the principle that a guilty plea must be knowing and intelligent. *Id.* at 1618.

Like the petitioner in *Bousley*, Fiore argues a fundamental constitutional principle – that due process is violated when the Commonwealth fails to prove each element of the offense charged. *See, infra,* Section A.

In *Bousley*, this Court explained the important difference between substance and procedure in the habeas context:

> The Teague doctrine is founded on the notion that one of the "principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.' " Teague, 489 U.S., at 312, 109 S.Ct., at 1076 (quoting Desist v. United States, 394 U.S. 244, 262, 89 S.Ct. 1030, 1040-1041, 22 L.Ed.2d 248 (1969)). Consequently, unless a new rule of criminal procedure is of such a nature that "without [it] the likelihood of an accurate conviction is seriously diminished," 489 U.S., at 313, 109 S.Ct., at 1077, there is no reason to apply the rule retroactively on habeas review. By contrast, decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct " 'beyond the power of the criminal law-making authority to proscribe,' " id., at 311, 109 S.Ct., at 1075 (quoting Mackey, 401 U.S., at 692, 91 S.Ct., at 1164), necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal."

> Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298, 2305, 41 L.Ed.2d 109 (1974). For under our federal system it is only Congress, and not the courts, which can make conduct criminal. United States v. Lanier, 520 U.S. 259, ___, n.6, 117 S.Ct. 1219, 1226, 137 L.Ed.2d 432 (1997)[.]

Id. at 1610. This Court's decision in *Bousley* is on all fours with the facts of the instant case. In Pennsylvania, only the legislature can make conduct criminal. An executive agency cannot create a fictional version of criminal conduct and urge it on the court.

Bousley stands for the proposition that even if *Bailey* announced only a new statutory construction and not a rule of constitutional law, a post conviction challenge based on *Bailey* may raise a constitutional claim. *Bousley,* 118 S.Ct. at 1610.

For example, in *United States v. Gobert*, 139 F.3d 436 (5th Cir. 1998), the petitioner collaterally challenged his sentence based on *Bailey*. In reversing the district court, the *Gobert* court explained:

> Even though *Bailey* itself is a statutory, non-constitutional case, it does not necessarily follow that a prisoner's post-*Bailey* petition for collateral relief sounds in statutory, non-constitutional law. We conclude, in fact, that the claim falls squarely within the ambit of the Fifth Amendment. Indeed, the well-settled case law of this and other courts compels such a conclusion. We have stated that if a defendant has been convicted of a criminal act that becomes no longer criminal, such a conviction cannot stand. After all, a refusal to vacate a sentence where a change in the substantive law has placed the

conduct for which the defendant was convicted beyond the scope of a criminal statute would result in a complete miscarriage of justice. Our sister circuits have held that a fundamental defect resulting in a complete miscarriage of justice is tantamount to a violation of the Due Process Clause of the Fifth Amendment. As we stated earlier, James Gobert maintains that he was convicted and imprisoned for engaging in conduct that the Supreme Court has since deemed non-criminal. If he is correct, our refusal to vacate his sentence would result in a complete miscarriage of justice; such a result would offend the Due Process Clause of the Fifth Amendment. The foregoing authorities make it clear to us that James Gobert has made a substantial showing of the denial of his constitutional rights to due process, notwithstanding that *Bailey* announced merely a new statutory interpretation. Accordingly, we issue a COA and advance to the merits of his claim.

Id. at 438-439 (footnotes omitted).

3. The Third Circuit Erred In Its Failure To Follow This Court's Lead In *Bousley v. United States*.

Petitioner submits that the Court of Appeals' rationale for not following the *Bousley* reasoning is not persuasive.[8] Whether or not the *Bousley* Court relied on the

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[8] The Court of Appeals stated, without explanation, "Because the *Bousley* decision rested on the Supreme Court's understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's refusal to give retroactive effect to a judicial interpretation of a state statute." *Fiore v. White, et al.*, 149 F.3d 221, 226 n.4 (3d Cir. 1998) (Pet. App. A-12).

"balance of power in the federal system," is a distinction without a difference, as the state balance of power between the judiciary and legislative branches is essentially the same as in the federal system.

In Pennsylvania, it is fundamentally accepted that only the state legislature has the power to define criminal offenses and to determine the punishments to be imposed. *Sullivan v. Commonwealth, Dept. of Transportation*, 682 A.2d 5, 8 (Pa. Commw. 1996), *alloc. granted*, 689 A.2d 237 (Pa. 1997); *Commonwealth v. Wacherer*, 41 A.2d 574 (Pa. 1945). Any common law crimes which prohibit the same conduct proscribed by statutory law are abolished. *See* 18 Pa. C.S.A. § 107(b); *Commonwealth v. Bellis*, 440 A.2d 1179 (Pa. 1982). There is no question that the conviction upon which Fiore's petition is based was not a common law crime. And, therefore, the relevant balance of power between the state's legislative and judicial branches does not differ from that in the federal system.

In *McNally v. United States*, 483 U.S. 350 (1987), this Court considered the scope of the mail fraud statute, which prohibits the use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." It ruled that the statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government. *Id.* at 359-360.

Subsequent to the *McNally* decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett*, (No. 87-C-8978 (85-CR-284) N.D. Ill. 1988) (Pet. App. F), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of the petition was this Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals (Pet. App. F-1).

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a manner consistent with the terms of the statute (Pet. App. F-8 to F-10).

Other courts collaterally have set aside mail fraud convictions, based on *McNally*. *See United States v. Mandel*, 672 F.Supp. 864, 875 n.5 (D. Md. 1987), *aff'd*, 862 F.2d 1067 (4th Cir. 1988). The *Mandel* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos*:

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may be subjected to punishment for crime in the

> federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck* [*v. United States*], 318 U.S. [236] at 243 [1943], "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

Mandel, 672 F.Supp. at 873-874 (citations omitted).

The general rule against the retroactive effect of a "new" statement of law ordinarily involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966). As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are applied retroactively only if they affect the truth-finding process. Here, however, as the District Court aptly noted, the Pennsylvania Supreme Court's ruling in *Scarpone* simply decided which of the two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct and, critically, the actual elements of the offense (Pet. App. E-11 to E-12; Pet. App. E-14 to E-15).

The Court of Appeals' reliance on *Martin v. Warden, Huntingdon State Correctional Institution*, 653 F.2d 799 (3d Cir. 1981) to deny "retroactive" application of *Scarpone* is misplaced. In *Martin*, which preceded both *Bailey* and *Bousley*, the Court of Appeals on collateral review of a state court conviction refused retroactively to apply *Commonwealth v. Waters*, 418 A.2d 312 (Pa. 1980). In *Waters*, the Pennsylvania Supreme Court revised the then-existing state law of felony-murder. The *Waters* decision clearly created **new law**, which would not be applied retroactively to collateral appeals, and the opinion plainly states that the Commonwealth's trial position was supported by existing case law. Moreover, the Court in *Waters*, citing a contemporaneously filed decision in *Commonwealth v. Legg*, 417 A.2d 1152 (Pa. 1980), noted that its ruling would have prospective effect only. *Waters*, 418 A.2d at 318.

Other decisions cited by the Court of Appeals in support of its "nonretroactive" decision are not persuasive. For example, *Young v. United States*, 124 F.2d 794, 799 (7th Cir. 1997), was decided prior to *Bousley*. *Young's* refusal to apply *Bailey* retroactively was based, in part, on the fact that "the Supreme Court has not held that *Bailey* applies retroactively[.]" *Id.* at 795. Likewise, *Hohn v. United States*, 99 F.3d 892 (8th Cir. 1996),[9] and *Brennan v. United States*, 867 F.2d 111, 121 (2d Cir. 1989), preceded

[9] *Hohn* was vacated on other grounds by decision of June 15, 1998, *Hohn v. United States*, 524 U.S. 236 (1998), approximately one month prior to issuance of the Court of Appeals' decision below.

this Court's *Bousley* decision. Hence, their ongoing merit is dubious.

The Commonwealth cannot argue that it was surprised by the Pennsylvania Supreme Court's decision. Indeed the very issue underlying this scenario, that is whether the DER permit was repudiated by Petitioner's and Mr. Scarpone's actions, was raised at trial when the judge was asked to clarify the instructions to the jury (J.A. 128). As such, the nonretroactivity principle has no role in this case.

The Court of Appeals' decision distorts this Court's nonretroactivity principle by expanding its scope far beyond this Court's original intention. The impact is that no remedy exists for a state prisoner who is imprisoned in violation of his due process rights.

Since the time of trial, Petitioner has argued continuously that due process required the state to prove the absence of a permit. Even if the state Supreme Court had not spoken in *Scarpone*, Petitioner's claim would be viable. The real impact of *Scarpone* is that it shows the validity of Petitioner's claim that an unambiguous element of the crime was the absence of a permit. The prosecutor's convoluted argument is ambiguous, but the statute is not.

The Third Circuit's ruling negates the role of habeas corpus relief intended by Congress and earlier by the framers of the Constitution. In *The Federalist* No. 84, Alexander Hamilton explained the Writ's inclusion in Article I, § 1 of the nascent constitution as "a remedy for [the] fatal evil" of what Blackstone termed the "engine of

arbitrary government." *See 1 William Blackstone, Commentaries* *136. The baseless conviction of Petitioner Fiore, his innocence, his ongoing punishment, and the absurd disparity in treatment of Petitioner and his co-defendant reflect arbitrariness that should not be countenanced by courts.

4. Assuming, Arguendo, That *Teague* Retroactivity Principles Apply, This Case Fits Within An Enumerated Exception.

Alternatively, assuming *arguendo* that Petitioner is seeking the benefit of a new rule, the *Scarpone* decision falls within the first exception to the nonretroactivity principle. This Court has held that two exceptions apply to this rule. The first applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson*, 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), *aff'd*, 536 F.2d 1013 (3d Cir. 1976).

While *Teague's* analysis of retroactive application is not directly applicable here, its holding and Justice Harlan's discussion of habeas jurisprudence in *Mackey v.*

United States, 401 U.S. 667, 675 (1971) (opinion concurring in part and dissenting in part), emphatically point to the same result that Petitioner seeks. Justice Harlan argued in *Mackey* that new constitutional rules generally should not be applied retroactively on collateral review. He recognized, however, an exception where the new rule makes "certain kinds of conduct beyond the power of criminal lawmaking authority to proscribe." *Id.* at 693. Justice Harlan explained:

> [n]ew "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

Id. at 692-693 (footnotes omitted).

Mackey looked to *United States v. United States Coin & Currency, supra,* in which this Court considered its earlier decisions holding that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct constitutionally could not be held criminal. 401 U.S. at 724; *see also Robinson v. Neil,* 409 U.S. 505, 509 (1973).

Similarly here, Petitioner's conduct, as admitted by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, even if the *Scarpone* decision was a "new rule," the facts of this case fall within the first exception to the nonretroactivity principle.

The Court of Appeals erred in refusing to follow the well-established constitutional principles of due process and the nonretroactivity rule and its significant exceptions carved out by this Court. As a result, persons within the jurisdiction of the Third Circuit have lesser rights to avoid basic injustice of wrongful conviction and confinement than do those of other Circuits. This Court should reverse the Court of Appeals decision to protect individuals including Petitioner Fiore from such a fundamental disparity and injustice that does not comport with constitutional standards.

5. The Habeas Statute Perpetuates An Historical Remedy To Resolve Egregious Miscarriages Of Justice Including The Incarceration Of Innocent Individuals.

The unique and independent nature of the "Great Writ" was explained by the Supreme Court in *Fay v. Noia,* 372 U.S. 391 (1963). In rejecting the State's suggestion that fact-finding by the state court had *res judicata* effect on federal habeas review, the Supreme Court responded:

> It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that res judicata is inapplicable in habeas proceedings, [ ] is really but an instance for the larger principle that void judgments may be collaterally impeached. [ ] So also, the traditional characterization of the writ of habeas corpus as an original [ ] *civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom,* emphasizes the independence of the federal habeas proceedings from what has gone before.

Id. at 423-24 (footnotes and citations omitted) (emphasis supplied).

The Supreme Court has always adhered to the principle that the "Great Writ" is, at its core, an equitable remedy. *Schlup v. Delo,* 513 U.S. 298, 319 (1995). This Court has relied consistently on the equitable nature of habeas corpus to preclude application of strict rules of *res judicata*. Thus, for example in *Sanders v. United States,* 373

U.S. 1 (1963), the Court held that the court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.* at 15-17. *See also McCleskey v. Zant*, 499 U.S. 467, 493 (1991).

The Court reaffirmed the equitable inquiry required by the "ends of justice" in a series of cases succeeding the *Sanders* decision. In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), seven members of the Court rejected the argument that in the light of the 1966 amendments, "federal courts no longer must consider 'ends of justice' before dismissing a successive petition." *Id.* at 451 (plurality opinion).[10]

This Court in *Kuhlmann* provided important guidance regarding when the equities of a case are so balanced in a petitioner's favor as to supersede the general rules limiting review:

> Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.

Id. at 452. This Court concluded:

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[10] In *Kuhlmann*, this Court was called on to determine when, if ever, a successive habeas petition by a state prisoner should be entertained by the courts. The state argued that its interest in finality and the 1966 Congressional amendments to 28 U.S.C. § 2254 weighed against a second, or successive, review of a state court conviction by the federal judiciary. *Id.* at 451.

> In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.

Id. at 454.

Similarly, in *Murray v. Carrier*, 477 U.S. 478 (1986), this Court ruled that in an extraordinary case, where a constitutional violation probably has resulted in conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default. Justice O'Connor observed that the Court had adopted the "cause and prejudice" analysis in part because of its confidence that that standard would provide adequate protection to "victims of the fundamental miscarriage of justice." 477 U.S. at 495-96, *quoting Engle v. Isaac*, 456 U.S. 107 (1982). Justice O'Connor also noted, however, that the Court had candidly refused "to pretend that this always will be true." *Murray*, 477 U.S. at 496. For that reason, she continued, " '[i]n appropriate cases,' the principles of comity and finality that inform the concept of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Id.* at 495, *quoting Engle*, 456 U.S. at 135.

While each habeas decision is based on a unique set of facts, it is difficult to imagine a situation where a petitioner's innocence is more patent. The Supreme Court of Pennsylvania decisively concluded that the conduct

upon which Mr. Fiore's conviction stands does not constitute a crime under the Pennsylvania statute charged. These facts present the quintessential situation wherein justice demands that habeas corpus relief be imposed.

CONCLUSION

"It must," wrote Justice Jackson, "prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown v. Allen*, 344 U.S. 443, 537 (1953). The burial of Petitioner's valid quest for justice persisted until the United States District Court for the Western District of Pennsylvania carefully reviewed the history and record of this case in state court. In its opinion granting the requested habeas relief, that court succinctly explained the fundamental unfairness of this situation:

> The merits of this matter present uncommon circumstances: two intermediate appellate courts in Pennsylvania applied the same facts to the same statute and reached opposing conclusions. Based upon the opinion of the Court of Common Pleas, the Superior Court concluded that Fiore was properly charged and convicted of operating a waste disposal facility without a permit under section 606(f) of the SWMA. Conversely, the Commonwealth Court determined that Scarpone, Fiore's codefendant, could not be convicted under section 606(f) because the DER had in fact issued a permit to operate the facility.
>
> Additionally, the Supreme Court was internally inconsistent with its respective rulings.

(Pet. App. E-11 to E-12). The District Court further wrote:

> In *Davis v. United States*, 417 U.S. 333 (1974), the United States Supreme Court held that the appropriate inquiry for the retroactive application of a change in the criminal law is whether "the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice and . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis v. United States*, 417 U.S. 333, 346 (1984) (internal citations and quotations omitted).
>
> The Supreme Court's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) did not establish a new rule of criminal procedure. As a consequence, the *Teague* standard does not apply to Fiore's petition.

(Pet. App. E-14). Finally, the District Court concluded:

> The circumstances pertaining to Fiore's incarceration are exceptional because his conviction was affirmed by one intermediate state appellate court and his co-defendant's conviction was reversed by a different intermediate state appellate court. Fiore's situation is also unusual because he remained incarcerated while the affirmation of the Supreme Court of Pennsylvania set aside the conviction of his co-defendant. Therefore, under the Supreme Court of Pennsylvania's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), Fiore is currently incarcerated for actions that did not constitute a violation of the section of the SWMA with which he was charged by the Commonwealth of Pennsylvania. Relatedly, the refusal by

> the Supreme Court of Pennsylvania to apply its decision to Fiore has resulted in an unjustified deprivation of his liberty interests.

(Pet. App. E-17).

Petitioner Fiore seeks to remedy a breach of his due process rights which has rendered him incarcerated for years based on his conviction of a crime while his co-defendant who was charged and convicted of the same crime, was released from that conviction by Pennsylvania's appellate courts. For ten years, Petitioner Fiore has brought this issue to the attention of the Pennsylvania state courts seeking nothing more than to be treated equally to his one-time employee and co-defendant. For unfathomable reasons, the Pennsylvania courts have refused to give Petitioner Fiore relief from this conviction which is indisputably based on insufficient evidence. As this Court has taught, "[t]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993).[11] Justice surely went awry in Pennsylvania. Upon exhausting all remedies in the state courts, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. His petition presented a strong showing of factual and legal innocence buttressed by a sound constitutional claim. As such it more than met the rigorous modern

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[11] The habeas statute provides a civil procedure to remedy criminal convictions where, as here, constitutional deprivations are involved. *Neely v. United States*, 546 F.2d 1059, 1065 (3d Cir. 1976).

standards required for relief. *See, e.g.*, H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970). The District Court properly granted the writ. Thereafter, the Third Circuit Court of Appeals reversed that decision based upon an unconstitutional analysis which denies liberty to an innocent man as it endangers the freedom of the citizenry. If allowed to stand the Third Circuit's decision will water the Great Writ beyond recognition.

To remedy this miscarriage of justice and prevent it from recurring, Petitioner Fiore urges this Court to reverse the Third Circuit Court of Appeals' decision and grant him federal habeas relief.

Respectfully submitted,

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